# NEPA Procedures & Terminology

Chapter 2 Module 2

HO # 4

# Module Objective

- LEARNING OBJECTIVE: The student will acquire a basic understanding of the terminology associated with the NEPA process.

# CEQ Advisory Manuals

- Considering Cumulative Effects Under the NEPA (1997)
- Environmental Justice:  Guidance Under the NEPA (1997)
- Designation of Non-Federal Agencies to Be Cooperating Agencies in Implementing the Procedural Requirements of NEPA (1999)
- Citizens Guide to NEPA  Dec 2007

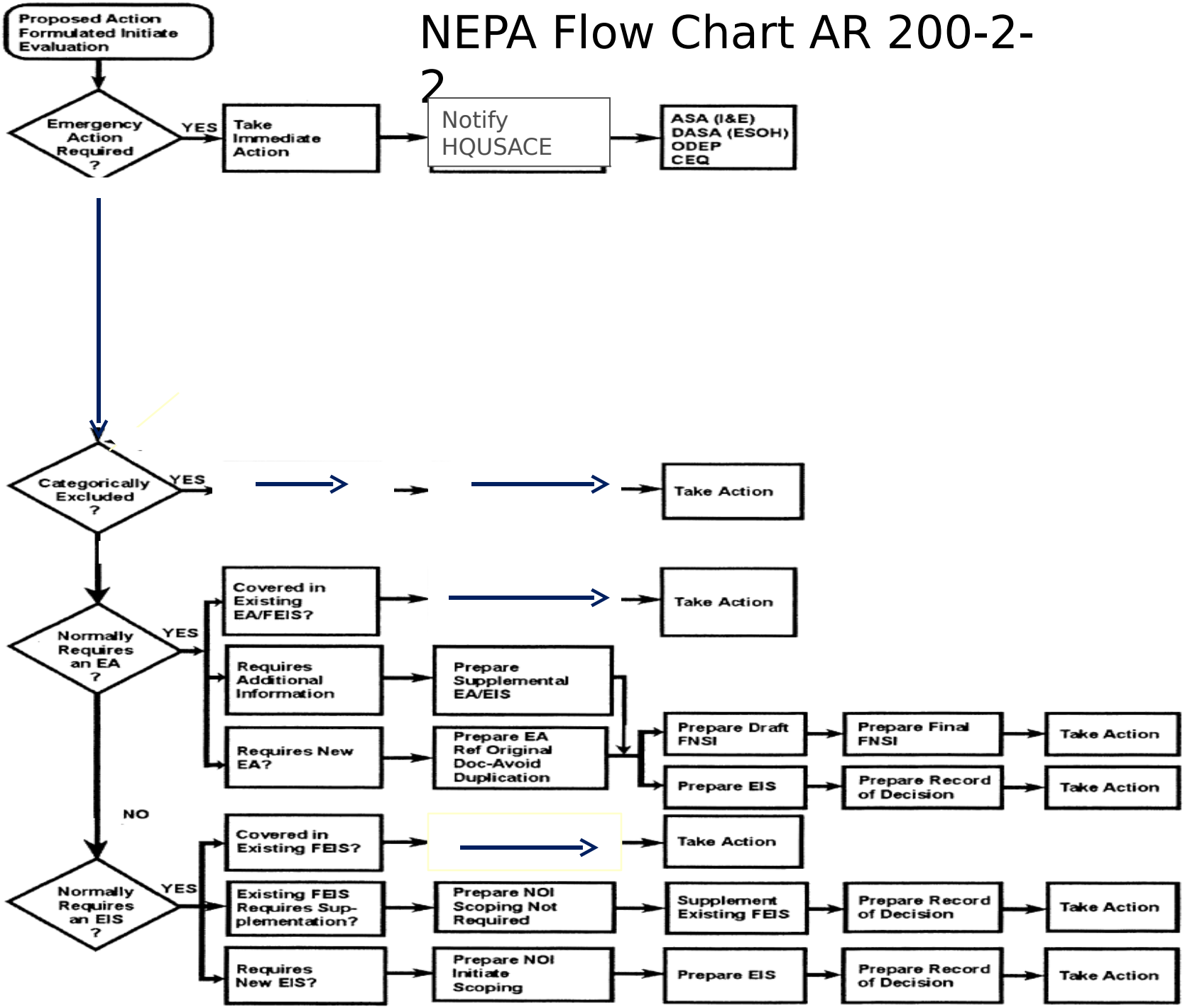
# Additional Guidance

- Emergencies and the NEPA 05122010
- Establishing, Applying & Revising Categorical Exclusion under the NEPA 11232010
- NEPA Draft Guidance, ‘‘Consideration of the Effects of Climate Change and Greenhouse Gas Emissions.’’ 02182010
- Amended EIS Filing System Guidelines FR Vol 76 No. 10 Jan 14, 2011
- CEQ Mitigation and Monitoring Guidance 14Jan2011

# Guidelines for Implementing NEPA

- Council on Environmental Quality 40 CFR Part 1500-1508 Nov 29, 1978
- USACE ER 200-2-2 effective March 4, 1988
  - Implements CEQ regulation.
  - Codified as 33 CFR Part 230 Feb 3, 1988
- Army Regulation 200-2
  - Army DOD activities not Civil Works.
  - Codified as 32 CFR Part 651 March 29, 2002
- 40 Most Asked Questions (1981)

# NEPA Flow Chart AR 200-2-2



# Record of Environmental Consideration (REC)

To: (Environmental Officer)
From: (Proponent)
Project title:
Breif description:

Anticipated date and/or duration of proposed action: (Month/year)

Reason for using record of environmental consideration (choose one):

a. Adequantely covered in an (EA, EIS) entitled _____, dated _____,

The EA/EIS may be reviewed at _____, (location)

OR,

b. Is categorically excluded under the provisions of CX _____, AR 200-2, appendix A, (and no extraordinary circumstances exist as defined in paragraph 4-3), because

_____

_____

_____

Date Project Proponent

_____

Date Installation Environmental Coordinator

Variation from this format is acceptable provided basic information and approvals are included in any modified document.

# Categorical Exclusions

- Must be published in agencies regulations.
- USACE has listed 18  actions (33 CFR 230.9 and ER 200-2-2).
  - Routine operation and maintenance.
  - Minor access roads and boat ramps.
  - Transfer of lands to other federal agencies.
- Compliance w/other federal laws still applies
- CEQ Memo Nov 23, 2010 Establishing, Applying & Revising CATXs under NEPA

# Categorical Exclusions

- Are there  CX's for a new Planning Project?

# Effects/Impacts

- Terms “Effects” and “Impacts” are often used interchangeably in NEPA.
- Effects on the human environment include effects on the NATURAL & PHYSICAL environment, and the aesthetic, historic, cultural, economic, social or health, whether direct, indirect, or cumulative WHEN RELATED to the physical effect.

# Effects/Impacts

- You have to physically affect the environment!
- Significant social & economic effects by themselves do not trigger an EIS.

# Metropolitan Edison Co. v. Pane, U.S. Supreme Court 460 766 (1983)

**You Have to Physically Affect the Environment**

The SC held that restarting the Three Mile Island Nuclear Reactor did not require NEPA analysis, even though its restart would cause psychological harm to neighbors, because restarting the reactor would not affect the physical environment.

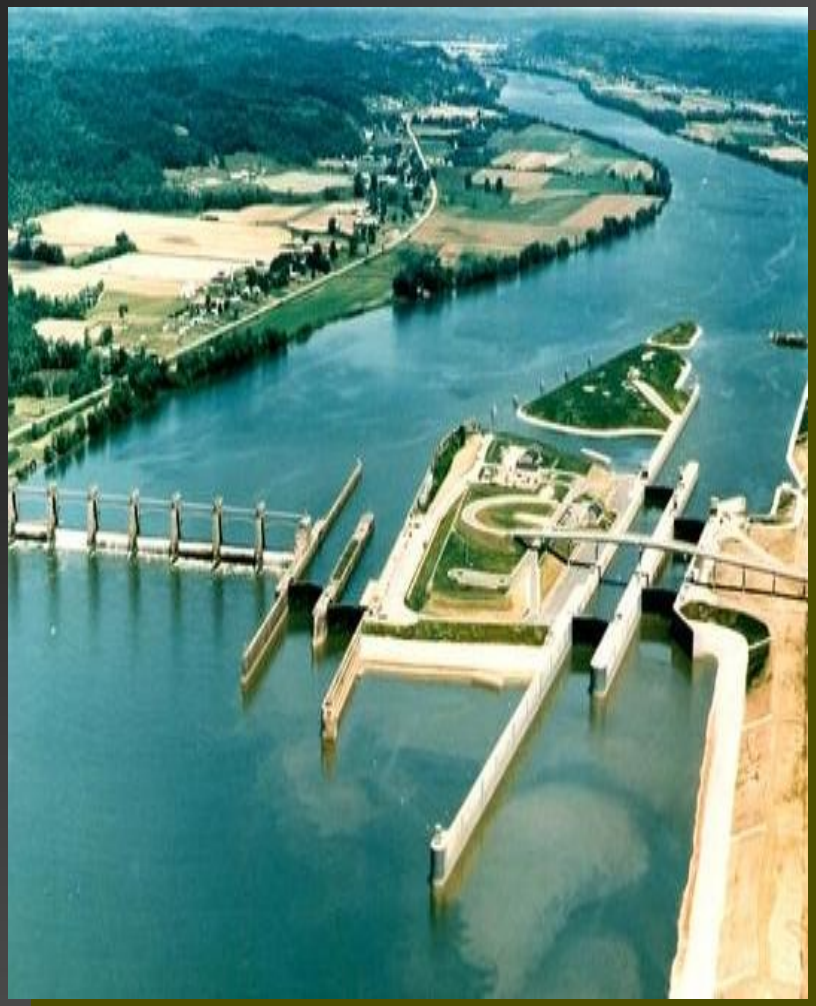
# Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995) cert. Denied 516 U.S. 1042 (1996)

**You Have to Physically Affect the Environment**

The Court held that preserving the natural environment did not require NEPA analysis because it did not alter the physical environment.

# Three Types of Effects/Impacts

- Direct Effects
  - Caused by the action and occurs at the same time and place
- Indirect Effects
  - Caused by the action but are later in time or removed in distance, but are still reasonably foreseeable



# Effects/Impacts Clarification

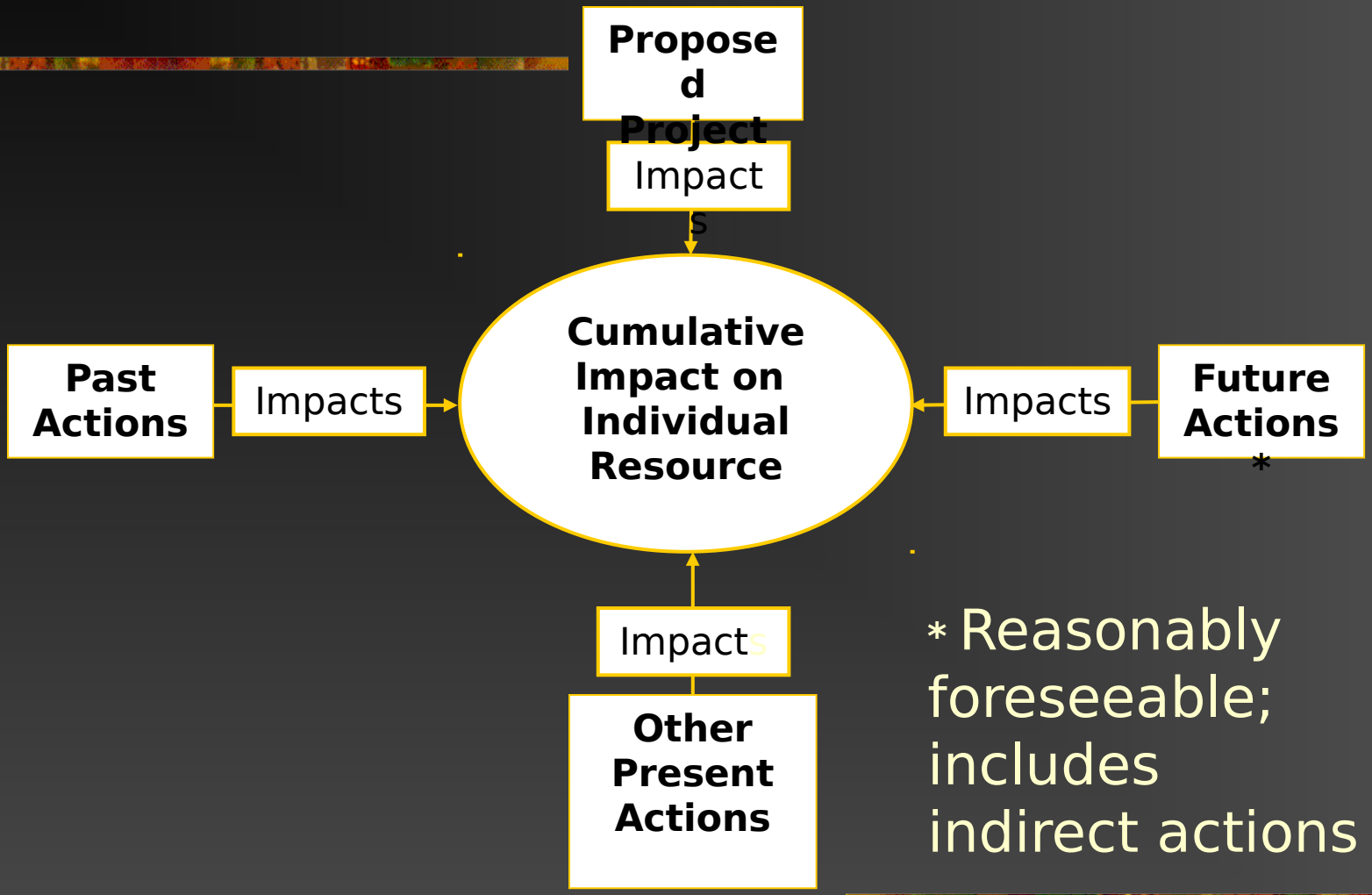
## Indirect vs. Cumulative

- The distinction between indirect and cumulative impacts is that indirect effects are **caused by the federal action** , whereas the cumulative impacts can arise from unrelated activities (including any associated indirect effects) that effect resources in common with the federal action in question.

# Three Types of Impacts (cont...)

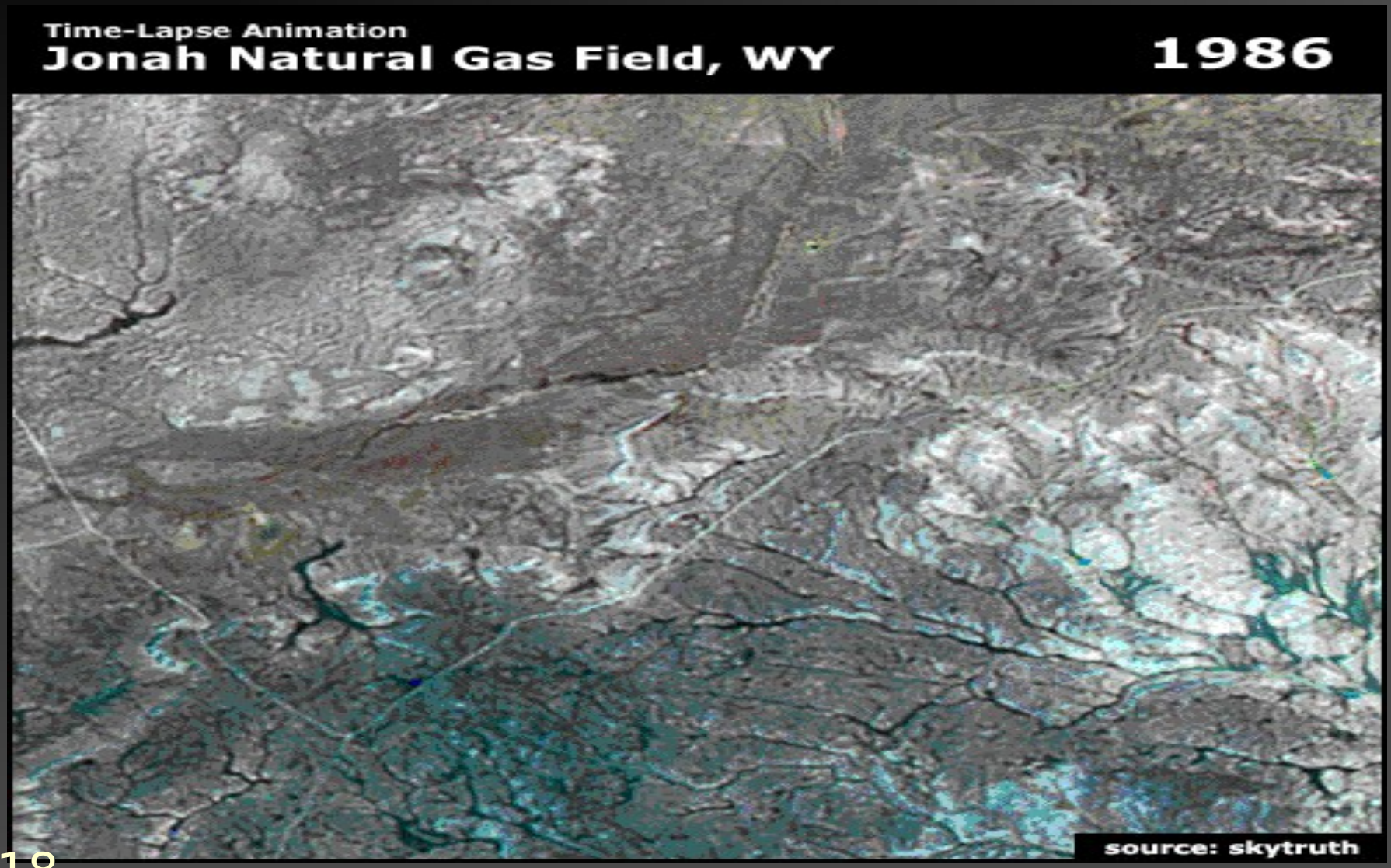
- Cumulative effects.
  - Effects that are additive in nature regarding a common resource.
  - Base your analysis on a defensible historical condition or “benchmark.”
  - CEQ mandated analysis (1508.25 (a)(2).
  - “Consideration of Cumulative Effects in EPA Review of NEPA Documents EPA 315-R-99-002 May 1999.

# Cumulative Impacts




* Reasonably foreseeable; includes indirect actions

# Cumulative Impacts



# National Environmental Policy Act

**What is a Significant Impact?**

Not Always an Easy Question!!!!

# Significantely (40 CFR § 1508.27)

- We are dealing with two questions!!
  - What is the significance of the impact?
  - What is the significance of the resource being impacted ? See Ch 6 Mod 1
- The answer to the second Q  can influence the answer for the first !!

# Significantly (cont)

- In NEPA “significance“ requires consideration in two perspectives. (Delaware Deepening 3rd Circuit 2012)
  - Context
    - The  local or setting of the action
    - Short and long term effects are relevant
  - Intensity
    - Severity of the impact.
    - Considerations include health & safety, controversy, uncertainty, precedence, cumulative,  and resource significance  .

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# Significance of Impacts (40 CFR § 1508.27)

- May be Adverse
- May be Beneficial
- May be Both Beneficial and Adverse
- May be Significant Even if on Balance the Effect is Beneficial

# Mitigative Environmental Assessment

- Reduction of impacts to negligible status through compensatory mitigation
- Mitigation features are integral component of the project
- Expressed in the EA and the FONSI
- NEPA requirements are met and EIS is not required

# Lead Agency

- Corps Civil Works projects = USACE is the lead agency.
- Supervises the preparation of the EIS. Requests cooperating agency participation.
- Publishes notice of intent to prepare an EIS in the Federal Register. (see detail in 33 CFR 230)
- Conducts Scoping Activity

# Cooperating Agency

- Federal agencies recognized as having jurisdiction shall be a cooperating agency .
- Federal agencies recognized as having special expertise may be a cooperating agency.
- 40 CFR 1501.6 provides basis for request .
  - Service is based upon formal written request of the lead agency.
- Cooperating Agencies normally will use own funds.
- Lead agency shall fund requested analyses/activities (if funds permit).

# Cooperating Agency Benefits

- Provides staff to enhance the interdisciplinary capability of the lead agency.
- Facilitates integrated decision making between federal agencies
- 40 CFR Ch V. NEPA Implementation Procedures FR Vol. 49. No. 247, Friday Dec 21, 1984
  - Appendix II - Federal and State Agencies with Jurisdiction by Law or Special Expertise on Environmental Quality Issues

# Scoping

- Process to define affected public and agency concerns and issues.
- Deters future legal challenges.
- Determines scope and significant resources and issues to be analyzed in the EIS.
- “PMP for the EIS.”
- Recommended but not required for an EA.

# Scope of Analysis

- Actions
  - Connected
  - Cumulative
  - Similar
- Alternatives
  - No action
  - Reasonable courses of action
  - Actions by others
- Impacts
  - Direct
  - Indirect
  - Cumulative

# Three Types of Action

- Connected
  - Actions that  that are closely related and cannot proceed without the other and therefore should be discussed in the same impact statement.  (interdepended)
- Cumulative
  - Actions when viewed with other proposed actions, not necessarily by the same agency, having cumulatively significant impacts  on common resources

# Three Types of Action (cont...)

- Similar
  - Actions when viewed with other reasonably foreseeable or proposed agency actions have similarities common timing or geography that provide a basis for evaluating their environmental consequences together

# Three Types of Alternatives

- No action*
- Reasonable courses of action ( driven by purpose and need)
- Actions by others

* P & G future w/o project condition Which has legal recognition?

# Mitigation

- Should be described in NEPA Doc and must be included in FONSI and or ROD
- NEPA lists  5 hierarchical actions to address mitigation.
  - Avoid the impact by not taking the action or parts of the action.
  - Minimizing the impact by  limiting the degree of action.
  - *Rectifying the impact by repairing the loss.*

# Mitigation (cont...)

- Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- Compensating for the impact by replacing or providing substitute resource.
- What happens If mitigation  brings the impacts below significance? (CEQ’s 40 FAQs #39)

# New Guidance on Mitigation

- CECW-PC 31 Aug 2009-Implementation Guidance for Section 2036 (a) WRDA 2007 Mitigation for Fish & Wildlife & Wetland Losses
  - Confirms consistency with standards and policies of the Corps's regulatory program.
    - Provides for a water shed approach
    - Requires Incremental justification
    - Requires a plan, success criteria/performance measures, MONITORING and ADM.

# Monitoring & Adaptive Management

- CECW-PB Memo of 31 Aug 2009 for Section 2039 WRDA 2007 Monitoring for Ecosystem Restoration.
- Drops 1% & 3%  cost ceilings of PGN.
- Costs  and components are subject to ATR/IEPR review for appropriateness  and are cost shared similar to Mitigation Planning
- Expands BUT does not mandate a monitoring window of up to10 years

# Guidance on ADM, Monitoring and Mitigation

- Originates from CEQ "a monitoring and enforcement program shall be adopted...where applicable for mitigation." 40 C.F.R. § 1505.2(c). 1988
- Reemphasized by CEQ Guidance Jan 14, 2011

# Tiering

- Optional use of  broad based programmatic analysis followed by subsequent site specific documentation.
- Eliminates repetitive discussions and focuses on issues at hand.
- Ties together inter-related projects in a common environment.
- Support cumulative impact analyses.

# Adoption- Incorporation by Reference

- The adoption by reference of all or portion of another NEPA document in the document being prepared
- Reduces duplication of the NEPA process allows adoption of other federal agency EIS, saves time and money.
- The adopting agency is responsible for the adopted portion.

40 CFR 1503.6

# Adoption- Incorporation by Reference

- Do it to Cut Down on Bulk
- Cite and Briefly Describe Information
- Material Must be Reasonably Available
- Proprietary Data Not Allowed

**(40 CFR § 1502.2**

# Supplements to an EIS

- Necessitated by substantive changes in a proposal relevant to environmental concerns.
- Can be precipitated by new information.
- An old EIS (greater than 5 years) should be reviewed regarding the need to supplement.
- Age alone does not require supplementation.
- An EIS can be supplemented by an EA/FONSI.

# Emergency Actions

- CEQ Guidance 40 CFR 1506.11
- ER 200-2-2 "… to prevent or reduce *imminent* risk of life, health, property, or severe economic losses…."
- Examples:
  - P.L.84-99- repair eligible storm damage reduction systems impacted by floods
  - Section 3 of Rivers and Harbor Act, 1945
    - Removal of navigation obstructions
  - Section 14 of the Flood Control Act, 1946
    - Streambank and shoreline protection projects

# Emergency Actions (cont...)

## EA-Level (No Significant Impacts)

- NEPA documentation should be accomplished prior to initiation of emergency work if time constraints render this practicable. (ER 200-2-2)

- Documentation may also be accomplished after the completion of emergency work, if appropriate. (ER 200-2-2)

# Emergency Actions (cont…)

## EIS-Level (Significant Impacts)

- “When possible, emergency actions considered major in scope with potentially significant environmental impacts shall be referred through the MSC to HQUSACE for consultation with CEQ regarding NEPA arrangements.” (ER 200-2-2)

- Alternative Arrangements (Hurricane Katrina, New Orleans District) 40 CFR 1506.11

# Take Away Points

- Scoping  is essential to good documents
- Cooperating agencies aid the process
- Impacts include direct, indirect & cumulative
- Impact significance is based on context and intensity ( IWR definitions of significance are factors to be considered)
- Actions may be connected, similar or cumulative
- Mitigation may avoid, minimize, rectify, reduce or compensate

# Take Away Points

- Monitoring and Adaptive Management actions need to be considered in the documentation, analysis and description of the proposed federal action
- Emergency actions can  proceed with alternative documentation procedures
- Information sources include adoption and reference or tiering to other documents